

SIERRA CLUB, TOIYABE CHAPTER

IBLA 93-367

Decided December 27, 1994

Appeal from a decision of the Battle Mountain District Manager, Bureau of Land Management, approving a mining plan of operations. N64-92-003P (NV-064.16).

Affirmed.

1. Environmental Policy Act--Environmental Quality: Environmental Statements--Mining Claims: Environment--Mining Claims: Plan of Operations--National Environmental Policy Act of 1969: Environmental Statements

A party challenging BLM's FONSI bears the burden of proving error, and a mere disagreement with BLM's finding is insufficient. On appeal, an appellant must demonstrate that BLM's FONSI is premised on a clear error of law, a demonstrable error of fact, or that BLM's analysis failed to consider a substantial environmental question of material significance to the action.

APPEARANCES: Glenn C. Miller, Reno, Nevada, for appellant; Charles L. Kaiser, Esq., Peter V. O'Connor, Esq., Denver, Colorado, for Atlas Gold Mining, Inc.; Burton J. Stanley, Esq., Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Toiyabe Chapter of the Sierra Club (Sierra Club) has appealed from a March 26, 1993, decision of the Battle Mountain District Manager, Bureau of Land Management (BLM), approving a development plan of operations submitted by Atlas Gold Mining, Inc. The plan calls for an open-pit gold mine to provide mill grade ore for processing at an existing Atlas facility. Development of this ore body is called the Gold Canyon project. Sierra Club asks that BLM's decision be withdrawn, that an environmental impact statement (EIS) be prepared, and that certain environmental protections be imposed.

The Gold Canyon project will disturb approximately 119 acres of land in secs. 4 and 5, T. 22 N., R. 50 E., Mount Diablo Meridian, Eureka County, Nevada. The Roberts Mountain wilderness study area (WSA) is immediately north of the project. The project consists of a 26.6-acre open-pit gold mine, three waste dumps covering 53.1 acres, 1.4 miles (29.2 acres) of haul

road, a 5.1-acre low-grade ore stockpile, a 3.7-acre growth medium stockpile, and disturbance of an additional 1.3 acres for drill sites. The open pit will not be reclaimed, but 92.4 of the 119 acres to be disturbed will be reclaimed.

Atlas has explored the Roberts Mountain area since 1984 and began production at its Gold Bar Mine in 1987. The Gold Bar discovery was followed by the Goldstone, Gold Ridge, and Gold Pick discoveries (collectively known as Gold Bar II) in 1986, 1987, and 1988. The gold ore from these discoveries is processed at the Gold Bar heap leach cyanide mill plant. The Gold Canyon project will also use the Gold Bar processing plant.

Sierra Club states that its members regularly use "the area surrounding the site for a variety of recreational activities" (Statement of Reasons (SOR), Apr. 21, 1993, at 1). It states that many of its members are hunters, and the area's prime deer hunting habitat will be negatively impacted by the decision. Sierra Club notes also that it has been active in wilderness protection and that the Roberts Mountain WSA would be impacted by the contemplated mining activity. ^{1/}

Sierra Club raises several arguments in support of its assertion that BLM's March 26, 1993, decision should be overturned. It first contends that BLM violated section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C) (1988), when it failed to prepare an EIS before approval of Atlas' plan of operations. Section 102(2)(C) requires an agency to include a detailed statement on the environmental impact of a proposed action in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. BLM prepared an environmental assessment (EA) of the Gold Canyon project and concluded that the project would not significantly affect the quality of the human environment. Sierra Club maintains that expansion of the Gold Bar mine, coupled with previous impacts, is sufficient to trigger the need for an EIS, because it is enough that a proposed action may significantly degrade some human environmental factor.

Sierra Club also argues that when BLM prepared its EA, it analyzed no credible alternatives to the proposed action, and failed to take a hard look at alternatives that would cause less environmental impact. An alternative urged by Sierra Club is sequential filling of mined-out pits with waste rock from the Gold Canyon pit (SOR at 5).

^{1/} Atlas filed a motion to dismiss Sierra Club's appeal for lack of standing, contending that Sierra Club is not a party to the case adversely affected by BLM's decision. The motion is denied. Sierra Club filed comments addressing BLM's EA on Mar. 7, 1993, and is a party to the case. The allegations in its statement of reasons are sufficient to establish that its members could be adversely affected by mining operations described in the approved mining plan.

Sierra Club contends further that BLM has wrongly segmented Atlas' gold mining operation in the Roberts Mountain area by dividing it into a series of related actions and reviewing each separately. It argues that the cumulative impacts upon wildlife habitat, scenic values, grazing, and paleontological values are sufficient to demand an EIS be written (SOR at 7-8).

Sierra Club also contends that the impact on the deer range is significant and substantial. According to Sierra Club, Atlas' operations impact 3,400 acres of deer range, and no mitigation efforts were presented, even though BLM has acknowledged that 38 percent of deer habitat would be affected by a reasonable foreseeable development scenario (SOR at 8-9). Sierra Club finds this to be a gross minimization of impacts to avoid an EIS.

Sierra Club also criticizes the absence of either mitigation measures or an effective reclamation plan in the EA and the fact that standards for revegetation will be set in the future. It argues that, even if 50 percent of pre-mine vegetation is reestablished, imposing this weak standard for a project of the size of the Gold Bar mine almost always requires an EIS. Sierra Club contends that half of the area will remain barren and probably never return to full productivity, and that bonding in an amount that is sufficient to assure reclamation is a major issue which is not adequately discussed in the EA (SOR at 11). Sierra Club also contends that the fact that, upon release of the bond, BLM will be responsible for public safety in the vicinity of the Gold Canyon pit is sufficient to require an EIS (SOR at 12).

Sierra Club states that a large number of cattle (113 animal unit months (AUM's)) will be displaced by the total mine disturbance and objects to BLM's conclusion that the surrounding land is capable of accommodating additional grazing. Sierra Club states that, at a minimum, BLM should require Atlas to purchase and retire those AUM's until vegetation has returned to pre-mining levels (SOR at 13). It also states that test plots required by previous stipulations should be monitored. Id.

Sierra Club's arguments are rooted in section 102(2)(C) of the National Environmental Policy Act (NEPA), which is essentially a procedural statute whose purpose is to insure that the agency makes a fully informed and well-considered decision. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978). NEPA is an action-forcing statute that requires agencies to take a hard look at the environmental consequences of a proposed action and provides for broad dissemination of relevant environmental information. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh environmental costs. NEPA is intended to assure informed agency action. It does not assure wise agency action. Id. at 350-51.

An EA is prepared by the agency to determine whether an EIS must be prepared. 40 CFR 1501.4(b) and (c). If, on the basis of its EA, an agency

makes a finding of no significant impact (FONSI) upon the quality of the human environment, no EIS is necessary. Union Oil Co. of California, 102 IBLA 187, 189 (1988). A decision to forgo an EIS will be upheld on appeal if the agency has identified and considered the environmental problems; identified relevant areas of environmental concern; and made a convincing case that the impact is insignificant, or if there is significant impact, that changes in the project have sufficiently minimized such impact. Southwest Resource Council, 96 IBLA 105, 113, 94 I.D. 56, 60 (1987).

[1] A party challenging BLM's FONSI must prove error - mere disagreement with BLM's finding is insufficient. Tulkisamute Native Community Council, 88 IBLA 210, 218 (1985). On appeal, Sierra Club must demonstrate that BLM's FONSI was premised on a clear error of law, a demonstrable error of fact, or that BLM's analysis failed to consider a substantial environmental question of material significance. Powder River Basin Resource Council, 124 IBLA 83, 91 (1992).

We find that Sierra Club's first argument, that BLM should have prepared an EIS, to be supported by little more than a bare expression of opinion. No citation to case law is offered to show that a contemplated operation of similar scope requires an EIS, and Sierra Club makes no express reference to error in BLM's action. A mere disagreement with BLM's FONSI, without more, does not establish a basis for reversal of agency action.

Sierra Club's contention that no credible alternatives were considered by the agency is belied by the record. The alternative of sequential filling of mined-out pits with waste rock from the Gold Canyon pit (which is endorsed by Sierra Club) and other alternatives are found in BLM's EA for the Gold Canyon project at pages 22-24. Sierra Club's favored alternative was rejected at page 24. As stated in the EA, BLM concluded that backfilling the Gold Ridge pit with 8.8 million tons of waste from the Gold Canyon pit would cost \$3.5 million, and would preclude further mining at the Gold Ridge pit. A similar analysis occurs in Atlas' plan of operations (N64-92-003P) at page 23, which notes that filling the Gold Ridge pit would increase air emissions and consumption of water (dust control) and fuel.

In its third argument, Sierra Club charges BLM with wrongfully segmenting Atlas' mining operations and failing to prepare an EIS to analyze cumulative impacts. A "cumulative impact" is the impact on the environment resulting from the incremental impact of an action, when added to other past, present, and reasonably foreseeable future actions, regardless of the agency (Federal or non-Federal) or person that undertakes the other actions. 40 CFR 1508.7. The Gold Canyon mine is at least the third Atlas venture in the Roberts Mountain area, and BLM's EA for the Gold Canyon mine incorporated two prior cumulative analyses and one prior EA. ^{2/} A further

^{2/} EA N64-EA2-42 incorporated the South Roberts Mountain Area Cumulative Analysis Report (N64-EA9-94) (1990), the Cumulative Assessment Report-

analysis of impacts is set out at pages 64-87 of the Gold Canyon EA, and a summary of the impacts can be found in Table 4.3.4-1. BLM has considered the impact of past, proposed, and reasonably foreseeable activities on topography, water, vegetation, wildlife, etc.

Appellant's arguments that BLM has segmented its analysis of Atlas' mining operations appears to be directed to prior BLM documents. However, there is no suggestion in the SOR that the Gold Canyon mine was reasonably foreseeable when prior environmental documents were prepared. Absent this finding, BLM's prior environmental documents cannot be faulted for a failure to consider the Gold Canyon project. In any event, BLM's current EA N64-EA2-42 is the only document at issue.

The cumulative impacts noted by Sierra Club include the impact of "acreage disturbed, the wildlife habitat lost, grazing pressure increases, the scenic values lost and the world class paleontological values impacted." In Sierra Club's view, these impacts are significant and should have triggered preparation of an EIS by the agency (SOR at 8). It is recognized that there is direct and cumulative impact on each of these areas. However, Sierra Club's arguments in favor of an EIS are not supported by citation to any case in which similar cumulative impacts mandated the preparation of an EIS. Sierra Club simply offers its views that the impact is sufficient to warrant preparation of an EIS. The views expressed by Sierra Club are appropriately expressed in comments to a draft environmental document, but they do not demonstrate that BLM erred in the preparation of the EA. As the party challenging BLM's action, the burden of demonstrating error in BLM's decision rests with appellant. See United States v. Connor, 72 IBLA 254, 256 (1983). Sierra Club has not carried this burden.

Sierra Club's fourth argument addresses the anticipated impacts of mining on mule deer. It states that 38 percent of mule deer habitat will be affected by mining. The 38-percent figure that Sierra Club uses is a cumulative estimate of the indirect impacts of past, present, and future mining in the Roberts Mountain summer range west of Roberts Creek (8,960 acres) (EA at 80). However, Sierra Club focuses only on a fraction of the mule deer summer range study area (41,600 acres) considered by BLM. Had Sierra Club considered indirect impacts to the Roberts Mountain summer range (28,800 acres), the percentage of range impacted would drop to 19 percent (EA at Table 4.3.3.8-1). Had Sierra Club considered indirect impacts to the entire 41,600-acre study area, the level of impact would drop further. Sierra Club has presented no supporting justification for its having limited its focus to the 8,960 acres west of Roberts Creek, and, by doing so, it has effectively segmented the summer range study area. More importantly, Sierra Club has not shown that BLM erred when making its FONSI determination for the Gold Canyon project.

fn. 2 (continued)

Roberts Mountain Region (1989), and BLM's Final Environmental Assessment (NV64-EA9-74) for the proposed Gold Bar Expansion Project (1990) (Gold Canyon Mine Project EA (1993) at 1, 64, and 86).

Indirect impacts are considered short term, and the acreage affected by such impacts includes the actual disturbance (mine, road, etc.) and a quarter-mile zone of disturbance around it ^{3/} (EA at 53, 79, 81). The quarter-mile figure is an estimate, and Atlas personnel state that deer are frequently observed near mine facilities, particularly during hunting season (EA at 53). Sierra Club's argument in favor of an EIS does not acknowledge the generally short-term nature of indirect impacts, address the experience of Atlas personnel regarding the behavior of deer within the quarter-mile buffer, or consider the full size of BLM's mule deer summer range. Sierra Club's argument also ignores the standards set forth in Powder River Basin Resource Council, *supra*, by failing to point to a clear error of law or a demonstrable error of fact, or to show how BLM's analysis failed to consider a substantial environmental question of material significance.

Sierra Club's fifth argument that mitigation and reclamation measures were not examined by BLM does not stand scrutiny. A reclamation plan addressing post-mining land use and topography, slope stability, revegetation, drainage and sediment control, etc., is part of Atlas' plan of operations (Answer, July 6, 1993, Vol. 1, Exh. A at 13-25). An extensive analysis of reclamation costs has also been prepared. *Id.* at 27-55. BLM addressed reclamation at pages 13-22, 51, and 62 of its EA. Mitigation measures for paleontological and cultural resources were addressed at page 88 of the EA and again at page 5 of the FONSI (Feb. 10, 1993) and page 8 of the Decision Record (Mar. 18, 1993). Based on Atlas' cost estimate, BLM required a bond in the amount of \$451,801 to cover reclamation costs of the Gold Canyon project (Decision, Mar. 12, 1993, at 1).

In addition, BLM's decision of March 26, 1993, conditioned approval of Atlas' plan of operations upon Atlas' acceptance of mitigation and reclamation measures. Specifically, reclamation earthwork must be completed by December 31, 1995. All waste rock piles must be contour ripped to increase water infiltration and reduce surface flow and related soil erosion. Reclaimed areas must be fenced until vegetation requirements are met. Topsoil obtained from nearby areas will be used if salvaged topsoil is insufficient to spread over disturbed surfaces (Decision, Mar. 26, 1993, at 2).

As in its arguments above, Sierra Club's criticism of a 50-percent revegetation standard is simply set forth in the SOR without support or data from similar mining operations that would indicate that use of this figure is either a clear or demonstrable error. Sierra Club's opinions are of use at the comment stage, but are not sufficient to establish error in BLM's decision, which is necessary before this Board. The standards set forth in Powder River Basin Resource Council, *supra*, need to be addressed by Sierra Club, and Sierra Club has neglected this duty.

^{3/} The acreage figure used when analyzing indirect impacts includes the area of actual disturbance (mine, road, etc.), and there will be a long-term or residual impact on a portion of this acreage (EA at 53, 79).

Sierra Club's concerns with public safety are addressed in the EA at pages 8 and 21 (open pit berm), 8 (waste rock dump berm), 38 (controlled access), and 21 (cautionary signs). The impacts of the Gold Canyon project on cattle grazing are analyzed in the EA at pages 33-34 (allotments), 52 (AUM's available), 65-66 (range improvements), 70 (management objectives), and 77-78 and 85 (AUM's lost).

The Gold Canyon project will not be without environmental impacts, and Sierra Club has pointed out a number of these impacts, both to BLM and to this Board. If one is to be successful on appeal to this Board, it is not enough to point out environmental impacts and seek to have BLM adopt a different course of action from that BLM has selected. Sierra Club must show error in BLM's decision, and give support of such showing both in fact and in law. When basing its SOR on its March 7, 1993, comments to BLM's EA, Sierra Club has apparently overlooked the respective functions that BLM and this Board serve. Simply stated, Sierra Club's SOR does not show error in BLM's decision of March 26, 1993.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the District Manager is affirmed.

R. W. Mullen
Administrative Judge

I concur.

John H. Kelly
Administrative Judge

